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No. 94-2137

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

GENERAL MOTORS CORPORATION,
Petitioner,

v.

JACK FRENCH, ROBERT M. WEST, ET AL.,
Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Third Circuit

BRIEF OF RESPONDENT, COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF TRANSPORTATION, JOINED BY THE STATE OF NEW YORK, CITY OF NEW YORK AND JEFFERSON PARISH, LOUISIANA, IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

DID THE THIRD CIRCUIT PROPERLY REVERSE THE DISTRICT COURT'S APPROVAL OF A CLASS ACTION SETTLEMENT WHERE THE DISTRICT COURT RECORD FAILED TO SUPPORT A CONCLUSION THAT THE PUTATIVE CLASS SATISFIED THE REQUIREMENTS OF FEDERAL RULE OF CIVIL PROCEDURE 23 AND THE SETTLEMENT WAS UNFAIR?

PARTIES TO THE PROCEEDING

The Commonwealth of Pennsylvania, Department of Transportation was misidentified in the petition for writ of certiorari as "Commonwealth of Pennsylvania."

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BRIEF OF RESPONDENT, COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF TRANSPORTATION, JOINED BY THE STATE OF NEW YORK, CITY OF NEW YORK AND JEFFERSON PARISH, LOUISIANA, IN OPPOSITION

Respondents, Commonwealth of Pennsylvania, Department of Transportation, the State of New York, the City of New York and Jefferson Parish, Louisiana (the "Government Respondents") respectfully request that this Court deny the petition for a writ of certiorari filed by General Motors Corporation ("GM") seeking review of the Third Circuit's opinion in this case.

STATEMENT OF FACTS

This petition concerns twenty-five purported class actions consolidated in the United States District Court for the Eastern District of Pennsylvania, which asserted federal claims under the Lanham Trademark Act, 15 U.S.C. §1125(a), and the Magnuson-Moss Warranty Act, 15 U.S.C. §23(d)(1), as well as various state law claims alleging strict liability, fraud, unfair trade practices and breach of contract. The actions sought compensatory and punitive damages for economic losses based on an abnormally high incidence of fuel-fed fires following side impact collisions to certain GM trucks. The class plaintiffs also sought an order requiring GM to recall the trucks or pay for their repair. (App. 19a).

Only four months after the underlying complaints were consolidated, on July 19, 1993, class counsel moved for authorization to notify class members of a proposed settlement. (App. 114a). By order dated July 20, 1993, the district court certified the class for settlement purposes only and approved the dissemination of notice of the proposed settlement to all persons or entities who had purchased in the United States (except residents of Texas) and were owners as of July 19, 1993, of a GM C/K full size pickup truck, model years 1973 to 1987, or a GM R/V pickup truck, model years 1987 to 1991. (App. 142a-143a).

The proposed settlement provided that members of the settlement class would receive a certificate worth $1,000 toward the purchase of a new GMC or Chevrolet light duty truck. Certificates could be transferred to family members or a third party purchaser of the vehicle and redeemed at full value. The holder of a $1,000 certificate could use it in conjunction with any other incentive or discount program in effect at the time of redemption. The proposed settlement also provided that the certificates could be transferred to non-family or non-third party purchasers, but in that event would be reduced in value to $500 and could not be used in conjunction with other incentive or discount programs. All certificates would have to be redeemed within fifteen months. (App. 156a-159a).

Class counsel subsequently filed an application for final approval of the class action settlement on September 15, 1993. On

October 26, 1993, the district court conducted a hearing concerning the fairness of the proposed settlement pursuant to Rule 23(a) of the Federal Rules of Civil Procedure. (App. 141a).

In accordance with the notice of proposed settlement, the Government Respondents, and others, filed timely objections to the proposed settlement asserting, among other things, that the terms of the settlement were not fair, reasonable or adequate as to government entities bound by competitive bidding statutes and budgetary constraints. (*See* App. 132a-133a). By memorandum and order dated December 16, 1993, the district court nonetheless approved the proposed settlement. (App. 141a). The Government Respondents, as fleet owners of GM trucks, each filed a timely appeal with the Third Circuit Court of Appeals. Several non-government truck owners appealed, alleging that the settlement was unfair because the settlement coupons were worthless, and because the settlement did nothing to repair the defective vehicles. These appeals were consolidated.

In an opinion and order issued on April 17, 1995, the Third Circuit reversed the district court's opinion and remanded the case for further consideration. (App. 17a). Specifically, the court held that: (1) Although settlement classes are permissible under the Federal Rules of Civil Procedure, this settlement class, on the record developed below, does not satisfy the requirements of Rule 23; and (2) The settlement is not fair and adequate. *Id.*

REASONS WHY THE PETITION SHOULD BE DENIED

GM formally presents two questions for review, and an additional question raised in the body of its petition not found in its questions presented. These are: (1) Whether a court may certify a settlement class and then approve a fair settlement without certifying the class pursuant to Fed. R. Civ. P. 23; (2) What is the proper test for approving a class action settlement; and (3) Whether a court of appeals may substitute its judgment for a district court's. None of these questions merit review.

GM's first argument initially is premised on a faulty assumption: that the settlement in this case was fair — the court of appeals prop-

erly found that it was not. Moreover, as we demonstrate below, there is no conflict among the circuits on the propriety of settlement classes where the settlement is, in fact, fair. In addition, the courts have never approved a settlement where it is clear that Rule 23 cannot be satisfied.

The second issue raised by GM also lacks merit. There is only a single standard that the lower courts use to judge a class action settlement — fairness under the facts of the case. GM's apparent confusion arises from the different results turning upon the facts of the individual cases.

GM's third issue is similarly without merit. A court of appeals is charged with evaluating the district court's discretionary rulings. If these rulings are erroneous the court will reverse or, as in this case, remand for further consideration.

For the following reasons, the Third Circuit, under the facts of this case, properly reversed the district court's settlement approval.

THE THIRD CIRCUIT PROPERLY REVERSED THE DISTRICT COURT'S APPROVAL OF A CLASS ACTION SETTLEMENT WHERE THE DISTRICT COURT RECORD FAILED TO SUPPORT A CONCLUSION THAT THE PUTATIVE CLASS SATISFIED THE REQUIREMENTS OF FEDERAL RULE OF CIVIL PROCEDURE 23 AND THE SETTLEMENT WAS UNFAIR.

One of the distinguishing aspects of class actions is that they require court approval before they can be settled. *See* Fed. R. Civ. P. 23(e) ("[a] class action shall not be dismissed or compromised without the approval of the court . . . . "). The rules make it clear that the district court must determine that the action is, in fact, a proper class action. Rule 23(c)(1) provides that the court shall make this determination "[a]s soon as practicable after the commencement" of the action.

The party advancing a class action has the burden of showing that the Rule 23 prerequisites[1] have been met. *Davis v. Romney*, 490 F.2d 1360 (3d Cir. 1974). Here, the proposed settlement stipulated that the action was a Rule 23(b)(3) class action. (App. 151a). But the district court never required the parties advocating the settlement to substantiate their assertions that the case was properly a class action. Instead, the district court skipped the Rule 23 analysis, certified a temporary settlement class[2], and immediately considered the

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Rule 23(a) establishes four threshold requirements: (1) That the class is so numerous that the joinder of all class members is impracticable; (2) That there are questions of law or fact common to the class; (3) That the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) That the representative parties will fairly and adequately protect the interests of the class.

If those prerequisites are met, the case must fall within one of the three categories in Rule 23(b): (1) Where separate actions would create a risk of varying adjudications: (A) to the party opposing the class, or (B) to the members of the class; (2) Where injunctive or declaratory relief on behalf of the class is appropriate; or (3) Where common questions of law or fact warrant class action.

Rule 23 (b) (3) class actions have two additional prerequisites: (1) common questions of law or fact must predominate over individual questions; and (2) the class action must be superior to other possible methods of adjudicating the controversy.

2

The Third Circuit described the temporary settlement class device as follows:

> The settlement class device is not mentioned in [Federal Rule of Civil Procedure 23]. Rather it is a judicially crafted procedure. Usually, the request for a settlement class is presented to the court by both plaintiff(s) and defendant(s); having provisionally settled the case before seeking certification, the parties move for simultaneous class certification and settlement approval. Because this process is removed from the normal, adversarial, litigation mode, the class is certified for settlement purposes only, not for litigation. Sometimes, as here, the parties reach a settlement while the case is in litigation posture, only then moving the court, with the defendants' stipulation as to the class's compliance with the Rule 23 requisites, for class certification and settlement approval. In any event, the court disseminates notice of the proposed settlement and fairness hearing at the same time it notifies class members of the pendency of class action determination. Only when the settlement is about to be finally approved does the court formally certify the class, thus binding the interests of its members by the settlement.

(App. 13a-15a) (footnote omitted).

fairness of the settlement.[3] As we demonstrate below, where objectors seriously contest both the certifiability of the class and the fairness of the settlement, it is error to skip entirely the question of class certification.

1. There is no conflict among the courts of appeals, despite GM's argument in its petition that the Third Circuit "magnified an existing conflict" among the courts of appeals over how to address class certification for settlement classes. (GM brief at 17). The Third Circuit perhaps encouraged this reading of its opinion by stating that it was explicitly rejecting the approach apparently followed by the Second and Seventh Circuits. (App. 52a-53a). A closer reading of the decisions, however, reveals that ultimately there is no conflict.

The courts of appeals, including the Third Circuit, all recognize the legitimacy of temporary settlement classes as a departure from Rule 23's procedural requirements where a settlement is negotiated between the parties before the class is certified.

The decisions, which will be discussed below, all include the caveat that the rights of absent class members may not be prejudiced by such a departure. Moreover, none suggest, as GM argues, that the district court can or should ignore arguments of objectors that the putative class does not satisfy Rule 23.

For example, in *Mars Steel Corp. v. Continental Ill. Nat'l Bank & Trust Co.*, 834 F.2d 677 (7th Cir. 1987), one of the cases relied on by GM, the district court certified the suit as a class action for settlement purposes only. The court held a fairness hearing, found the settlement fair, and approved it. On appeal, the Seventh Circuit considered, among other things: (1) Whether the class should have been fully certified before settlement was approved; and (2) Whether the settlement was fair. The court began by reviewing Rule 23 to determine the propriety of temporary settlement classes.

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[3] The district court found the settlement to be fair, but concluded, among other things, that "a risk exists in maintaining class certification." (App. 125a-126a). As the Third Circuit pointed out, "[t]he district court's concern...that the class could not maintain its class status, is somewhat inconsistent with its certification of the class for settlement purposes." (App. at 101a) (footnote omitted).

The court stressed that there were problems inherent in temporary settlement classes:

> Settlement negotiations are made more complicated when the parties don't know whether they are trying to settle a class action or an action limited to the named plaintiffs, don't know whether the named plaintiffs would be deemed adequate representatives of the class if the case proceeded to trial, and don't know the composition and size of the class. The danger of a premature, even a collusive, settlement is increased when as in this case the status of the action as a class action is not determined until a settlement has been negotiated, with all the momentum that a settlement agreement generates - if its class status is *ever* determined . . . . [W]here the notice of the class action is, again as in this case, sent simultaneously with the notice of the settlement itself, the class members are presented with what looks like a fait accompli.

Id. at 680-81 (emphasis in original).

The Seventh Circuit also found, however, that "every court that has addressed the question, including our own, has declined to hold that the procedure is a per se violation of Rule 23 and therefore requires that the settlement automatically be disapproved." *Id.* at 681. The court gave two reasons for this. First, a class certification proceeding would often be a waste of time and money. Second, and more important: "[T]he procedure creates only a possibility, not a certainty, of abuse, a possibility held in check by the requirement that the judge determine the fairness of the settlement before he can approve it." *Id.* The court thus found the settlement fair and upheld it. But it issued the following caveat:

> Given the momentum that, as we noted earlier, a settlement agreement acquires once it has been negotiated, the district judge might have been well advised to hold a brief evidentiary hearing before giving preliminary approval of the settlement and issuing notice of it to the class. But there is no ironclad requirement of such a hearing . . . and its omission in this case was not a reversible error . . . . A different conclusion would be possible, however, if the case for final approval of the

> settlement were weaker than it was in this case and it appeared that the final approval was due to the momentum generated by a preliminary approval based on inadequate evidence.

Id. at 684-685 (citations omitted).

Importantly, the objectors in *Mars* did not claim that the class did not meet the Rule 23 prerequisites. The court was able to dismiss the only fairness objection — that the amount of money the settlement gave the class was not enough — concluding that the amount received was reasonable under the circumstances. Here, the Third Circuit doubted whether the commonality, typicality, and adequacy of representation prongs of the Rule 23 analysis could be met by this case. Plainly, this case differs significantly from *Mars*. If the Seventh Circuit were faced with a direct challenge to the certifiability of the class, it likely would reach the same decision the Third Circuit did here.

Similarly, in *Weinberger v. Kendrick*, 698 F.2d 61 (2d Cir. 1982), *cert. denied*, 464 U.S. 818 (1983), a settlement negotiated in bankruptcy court was presented to the district court in settlement of the class action claim. The parties jointly submitted affidavits attesting to the fairness and adequacy of the settlement. The district court held a ten minute fairness hearing, and concluded that the settlement was fair, reasonable, and adequate. The Second Circuit reasoned that: "There are weighty justifications, such as the reduction of litigation and related expenses, for the general policy favoring the settlement of litigation." *Id.* at 73. Therefore, as in *Mars*, the court ruled that the absence of class certification before notice of the settlement is not an absolute bar to approval. It, however, issued a caveat similar to that set forth in *Mars*:

> Although we thus refuse to adopt a per se rule prohibiting approval when a class action settlement has been reached by means of settlement classes certified after the settlement, with notice simultaneous with that of the settlement, we emphasize that we are permitting, not requiring, use of this procedure, and also underscore that . . . district judges who decide to employ such a procedure are bound to scrutinize the fairness of the settlement agreement with even more than the usual care.

Id. at 73 (citation omitted).

As with *Mars*, there was no claim in *Weinberger* that the Rule 23 prerequisites could not have been met. The only claim made regarding fairness — that because the district court only issued a two page opinion, it could not have properly evaluated the fairness of the settlement — was easily rejected by the Second Circuit. The Second Circuit did not intimate that, faced with circumstances as the Third Circuit had before it in this case, it would ignore arguments that the putative class did not satisfy Rule 23.

In fact, the Second Circuit more recently decided a case in a manner very similar to the Third Circuit's approach here. In *In re Drexel Burnham Lambert Group*, 960 F.2d 285 (2d Cir.), *cert. dismissed*, 113 S.Ct. 1070 (1993), the objectors challenged the typicality and adequacy of representation prongs of the Rule 23 test. The court looked at these issues and found that Rule 23 was met. The court also found the settlement fair and upheld its approval.

Plainly, the cases relied upon by GM as conflicting with this case[4] are consistent with the decision here; they are merely cases in which the courts of appeals agreed that the Rule 23 prerequisites were satisfied and the settlement was fair. This case is different. Here, the district court's and Third Circuit's doubt that the Rule 23 requirements could be satisfied raises different questions.

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[4] The following cases also were cited by GM as conflicting: *Mars; Weinberger; In re A.H. Robins Co.*, 880 F.2d 709 (4th Cir.), *cert. denied*, 493 U.S. 959 (1989) (Fourth Circuit upheld provisional certification by following strict Rule 23 criteria, and found the settlement fair and adequate); *In re Dennis Greenman Securities Litigation*, 829 F.2d 1539 (11th Cir. 1987) (where district court fully certified the class under Rule 23(b) (1), Eleventh Circuit held it was harmless error for the district court to certify the class a second time for settlement purposes only, but nonetheless found the case was not a proper Rule 23(b) (1) class action); *Officers for Justice v. Civil Service Comm'n*, 688 F.2d 615 (9th Cir. 1982), *cert. denied*, 459 U.S. 1217 (1983) (where district court certified the class pursuant to Rule 23 for certain issues only, court of appeals upheld settlement as fundamentally fair, adequate, and reasonable); *In re Corrugated Container Antirust Litigation*, 643 F.2d 195 (5th Cir.), *cert. denied*, 456 U.S. 998 (1982) (where district court failed to undertake an analysis of the facts and law relating to the adequacy of the proposed settlement, the court of appeals remanded the case for findings).

Interestingly, the question assertedly presented by GM is whether a court can certify a *fair and adequate* settlement without deciding the issue of class certification. This question, of course, assumes that the court is really presented with a fair settlement, and that it has looked at the settlement to ensure that it is fair. Without meeting the requirements of typicality, commonality, and adequacy of representation, the settlement cannot be fair in any meaningful sense. Accordingly, a court of appeals cannot uphold a settlement as fair in the face of substantial arguments that it does not satisfy Rule 23's requirements.

A finding of substantive fairness without an exploration of the Rule 23 criteria can never be a substitute for procedural regularity; a term which was never used by the *Mars* or *Weinberger* courts. All that *Mars* and *Weinberger* say is that a court of appeals can overlook procedural irregularity if that irregularity did not affect the result of the case (i.e., it was at most harmless error). This case stands for the proposition that a court of appeals will not overlook procedural irregularity where that irregularity did affect the result of the case (i.e., it was prejudicial error).

One leading commentator has described temporary settlement classes as "nothing more than a tentative assumption indulged in by the court to facilitate the amicable resolution of the litigation, rather than as some sort of conditional class ruling under Rule 23 criteria." 2 H. Newberg & A. Conte, *Newberg on Class Actions*, §11.27, at 11-50 (3d ed. 1992) (footnote omitted). Although Newberg supports these types of indulgences, he recognizes the value of Rule 23 in the settlement context:

> Certification of an expanded settlement class does not obviate the need to apply class action prerequisites of typicality and commonality of claims or adequacy of representation, but these tests must be applied in the context of representing the class for proposed class settlement purposes, in contrast to satisfying these criteria in an adversary litigation environment.

Id. at 11-49. Therefore, although the class certification analysis in the settlement context may be somewhat different, it cannot be ignored altogether. On this point, the lower courts are in agreement.

2. GM's claim that there are different standards used by the courts to judge the fairness of a settlement is clearly misplaced. There is only one standard to determine the adequacy of a settlement: fairness under the circumstances of the case. Whether the court employs a nine factor test as prescribed by the Third Circuit, a six factor test as used by the Fifth Circuit, *see Parker v. Anderson*, 667 F.2d 1204 (5th Cir.), *cert. denied*, 459 U.S. 828 (1982), or a standard with no specifically delineated subparts, *see Mars; Weinberger*, a court of appeals will review the district court's discretionary ruling on the evidence in the record, with all reasonable inferences arising from the record. *See Evans v. Jeff D.*, 475 U.S. 717, 742 n.35 (1985) ("Each negotiation, like each litigant, is unique; reasonableness can only be determined by looking at the strength of the plaintiff's case, the stage at which the settlement is effective, the substantiality of the relief obtained on the merits, and the explanations of the parties as to why they did what they did."). GM's claim plainly is without merit.

3. The Third Circuit properly reversed the district court's order because the district court abused its discretion in ruling that the settlement was fair. (App. 75a-76a). Therefore, regardless of whether the Third Circuit was right in ruling that a Rule 23 analysis is required before approving a settlement, the Third Circuit's reversal was warranted.

The Third Circuit evaluates the fairness of a class action settlement under the factors enumerated in *Girsh v. Jepson*, 521 F.2d 153 (3d Cir. 1975). The Third Circuit exhaustively considered the record under these factors and this settlement failed the test. The court found the settlement unfair because it does not resolve the claims presented by the complaint, but instead provides class members with coupons that had "no cash value and made no provision for repairing the allegedly life-threatening defect." (App. 77a).

The Government Respondents join in these concerns, which have been forcefully argued by non-government class members. And, even if the settlement could be considered fair in a general sense, it remains unfair to government fleet owners.

The settlement is unfair to government fleet owners because they will not be able to participate in the settlement on a level equal to that of other class members. In general, appellate courts do not uphold settlements that affect class members disproportionately.

See Piambino v. Bailey, 610 F.2d 1306 (5th Cir.), *cert. denied*, 449 U.S. 1106 (1980) (vacating an order approving a class action settlement because the district court "fail[ed] to assess the interests of the two categories of plaintiffs to determine whether the settlement was fair, adequate and reasonable as to each") (emphasis omitted); *In re General Motors Corp. Engine Interchange Litigation*, 594 F.2d 1101 (7th Cir.), *cert. denied*, 444 U.S. 870 (1979) (disapproving settlement which released the federal claims of all class members, but provided no compensation to a subset of the class); *Manual for Complex Litigation, Second*, §30.41, at 224-225 (1993) (in examining fairness of settlement, courts should examine whether particular segments of the class were treated differently from others.)

The Government Respondents objected to the proposed settlement because unlike individual truck owners, or even private fleet owners, recovery via a coupon is not reasonable for government fleet owners. While a private individual can consciously choose to purchase a GM truck, in order to use the coupon, government entities, as a rule, cannot make that choice. The product ultimately supplied to government entities such as the Government Respondents, and the vendor chosen to supply it, are selected according to rigid statutory and regulatory procedures enacted to ensure that government contracting is undertaken in an open, fair, and competitive manner.[5] As a result, government entities generally must deal with the lowest responsible bidder and have little control over whether the certificates can be used in any planned purchases of trucks.

The district court curtly and cavalierly dismissed all consideration of competitive bidding requirements with a single sentence: "The court is confident that ingenious counsel will be able to structure bidding requirements so that the government entities can take full advantage of the certificates." (App. 133a). Fortunately, the Third Circuit took a more realistic attitude, and declined to endorse subversion of the competitive bidding process. (*See* App. 81a).

It is also no benefit to government agencies that the certificates may be transferred with a 50% diminution in value. Because of competitive bidding laws, a government owner is put in the

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[5] *See* Sections 507, 2403, and 2407 of the Administrative Code of 1929, 71 Pa. Stat. Ann. §§187, 633, and 637 (1993-94); *see also* 38 La. Rev. Stat. Ann. §2211 (West 1995), 4 Pa. Code, Chapter 69.

unreasonable position of having to decide either to: (1) Market all the certificates at the outset, thus realizing at least a 50% diminution in its recovery; or (2) Hold the certificates hoping that a GM vendor will be the lowest responsible bidder[6] and, if a GM vendor is not successful, hoping that there is sufficient time left in the short fifteen-month redemption period to then realize some value in marketing the certificates.

The Third Circuit found these concerns to be "a potentially serious intra-class and conflict inequity." (App. 81a). This inequity raises a conflict of interest between the class representatives and government members of the class. Here, the class representatives have advocated a settlement which cannot be accepted by the Government Respondents or other government fleet owners. Although the class representatives knew that a significant number of class members fall within this category, they have refused to adjust the settlement to accommodate them.

Where a conflict arises after the class has been certified, the court remains free to modify the class certification to suit the circumstances. In fact, because all members of the class are bound by the results of the class action, the court has a continuing duty to protect absent class members. *In re Fine Paper Antitrust Litigation*, 617 F.2d 22 (3d Cir. 1980); *see also Veccione v. Wohlgemuth*, 80 F.R.D. 32 (E.D.Pa. 1978) (requirement of adequacy of representation is a basic due process requirement).

Thus, the district court's ruling that the settlement was fair was an abuse of discretion. In fact, the Third Circuit stressed that this was an alternate ground for reversal (App. 72a-73a) ("Because we leave open the possibility that the district court may on remand properly certify the class . . . we must also address the district court's approval of the settlement"). This ground for reversal is therefore dispositive even if the class can be properly certified. Notably, even GM has raised no objection to the Third Circuit's

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[6] Under Pennsylvania law, for example, the requirement to award to the lowest responsible bidder 'implies a common standard under which all bids may be received...[including previously prepared specifications, freely accessible for all competitors; on these alone shall their bids be based...."*Ezy Parks v. Larson*, 499 Pa. 615, 623-24, 454 A.2d928, 932-33 (1983) (quoting *Page v. King*, 285 Pa. 153, 156-157, 131 A.707, 708-709 (1926)).

finding that the district court abused its discretion by failing to consider the disparate impact of the settlement on the governmental entities within the class. Indeed, GM does not even mention it.

Finally, the Third Circuit's decision is consistent with the decision of the Texas Court of Appeals in *Bloyed v. General Motors Corp.*, 881 S.W.2d 422 (Tex.Ct.App. 1994), *appeal granted*, 38 Tex. Sup. Ct. J. 275 (Tex. 1995). There, the court reviewed a settlement virtually identical to this settlement, characterizing it as a "tremendous sales bonanza" for GM. *Id.* at 431. The *Bloyed* court thus set aside approval of the settlement, finding that it provided absolutely nothing to those unwilling or unable to purchase another GM truck, and did nothing about the allegedly dangerous vehicles left on the road.

Any error by the Third Circuit in applying the abuse of discretion standard (conceded by all to be the proper standard of review) to the unique facts of this case certainly does not merit this Court's attention. The specific problem analyzed by the Third Circuit here—namely the ability of governmental entities to utilize the $1,000 certificates in light of budgetary constraints, competitive bidding laws and the unusual restrictions on transfer particular to this settlement—is not likely to arise in other class action litigation. To be sure, other class action settlements have involved coupon deals. *See, e.g., New York v. Nintendo of America, Inc.*, 775 F. Supp. 676 (S.D.N.Y. 1991) ($5 coupon valid toward game cartridges); *Phemister v. Harcourt Brace Jovanovich, Inc.*, 1984 Trade Cas. (CCH) ¶66,234 (N.D. Ill. 1994) ($25 coupon valid towards professional education courses or publications). Few if any, however, have involved coupons valid only toward purchases that implicate competitive bidding laws, since to implicate such laws, the items purchased must both be expensive and a type of item generally purchased by governmental entities.

Clearly, the Third Circuit's decision turns on the unique facts of this case and the manifestly unfair settlement approved by the district court. Similarly, there is no conflict among the courts of appeals. Most importantly, the Third Circuit was right: this settlement should never have been approved in its current form. Hence, although the decision is important to the many members of the class that it will directly affect, it is not a matter of vital importance to other persons.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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